Filed 8/10/17 In re K.B. CA1/1

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re K.B., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. K.B., Defendant and Appellant.	A149813 (Napa County Super. Ct. No. JV18248)

Appellant K.B., a minor, admitted to committing assault with a deadly weapon. K.B. was declared a ward of the court and placed on formal juvenile probation. Following multiple violations of her probation, the court modified the terms of K.B.'s probation to include, among other terms, an electronic search condition. K.B. now appeals from this postdisposition order, arguing the electronic search condition is not reasonable under *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*), and is unconstitutionally overbroad. We conclude the condition is reasonable but overbroad, and we modify it accordingly.

I. BACKGROUND

Since the age of 11, K.B. has resided in a number of out-of-home placements due to escalating behavior associated with threats of physical violence against others, self-harm, lying, and stealing. It is apparent K.B. suffers from various mental health issues, potentially associated with her traumatic early childhood.

While attending a youth program, K.B. became angry, located a piece of broken glass and began cutting herself. When a staff member sought to intervene, she put the glass against the staff member's throat and threatened to cut her. In a separate incident, K.B. broke various windows and damaged a vehicle while angry with another staff member. The district attorney filed a Welfare and Institutions Code[1] section 602 petition against K.B., alleging felony assault with a deadly weapon and vandalism. K.B. admitted the felony assault.

The juvenile court subsequently declared K.B. a ward of the court, and she was placed in a residential treatment program. The terms of K.B.'s probation required her, among other conditions, to remain in the residential treatment program, obey reasonable directives from the residential treatment program, probation officers and juvenile hall staff, and obey all laws.

Shortly thereafter, K.B. absconded from her placement with a peer from the program and an unknown individual. Upon her arrest by law enforcement, she informed them she had consumed stolen pain medication and began cutting herself with a broken CD in her possession. About two months later, K.B. absconded from her placement, obtained a sharpened stick with barbed wire from a neighbor's property, and threatened to kill staff members. Upon the arrival of law enforcement, K.B. began cutting herself. A few weeks later, K.B. again absconded from her placement, threatened to harm staff members and then threatened to harm herself. Following this third escape, K.B. was transported to juvenile hall for violating her probation.

The district attorney filed a supplemental section 602 petition, alleging two counts of escape from a juvenile facility and violating probation. K.B. admitted one count of escape and the probation violations. The probation department began looking for a new placement that would be appropriate given K.B.'s history of violent and aggressive behavior, coupled with her multiple abscondences. During this time, the juvenile court

[1] All statutory references are to the Welfare and Institutions Code.

continued K.B.'s wardship and ordered K.B. to remain in juvenile hall pending placement.

Despite the probation department's efforts to locate a suitable treatment program to accept K.B., it was unable to do so. The probation department subsequently recommended that K.B. remain in juvenile hall for six additional months, to be followed by renewed efforts to locate an appropriate residential placement. The probation officer also recommended additional terms and conditions of probation, including the electronic search provision.

At the subsequent hearing on the probation department's recommendations, defense counsel argued the proposed electronic search condition was "overly broad."[2] In response, the probation officer noted, "We have ongoing concerns about the minor, and when she . . . has been in a placement, her behavior, runaway behavior, she's inappropriately contacted numerous people via cell phone and other means." The juvenile court accepted the probation department's recommendation and modified its order of probation. In doing so, the court imposed an electronic search condition, which ordered K.B. to submit all electronic devices, including "contents contained on any device or cloud or internet connected storage," to a warrantless search at the request of a probation or law enforcement officer.

II. DISCUSSION

A. *The Electronic Search Condition Is Reasonable*

K.B. argues the electronic search condition is invalid pursuant to the criteria established in *Lent*. Recognizing trial counsel's failure to object to the condition results in forfeiture of the argument (*In re Sheena K.* (2007) 40 Cal.4th 875, 885), K.B. argues trial counsel was ineffective for failing to do so.[3]

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[2] Trial counsel also argued the probation department failed to explain the change in circumstances justifying the modification of the earlier probation order as required by section 778. However, K.B. has not asserted this argument on appeal.

[3] K.B. also argues her *Lent* challenge was not waived if an objection would have been futile. But neither of the cases she cites supports her position. K.B. has not

"Establishing a claim of ineffective assistance of counsel requires the defendant to demonstrate (1) counsel's performance was deficient in that it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient representation prejudiced the defendant, i.e., there is a 'reasonable probability' that, but for counsel's failings, defendant would have obtained a more favorable result. [Citations.] A 'reasonable probability' is one that is enough to undermine confidence in the outcome. [Citations.] [¶] Our review is deferential; we make every effort to avoid the distorting effects of hindsight and to evaluate counsel's conduct from counsel's perspective at the time. [Citation.] A court must indulge a strong presumption that counsel's acts were within the wide range of reasonable professional assistance. [Citation.] . . . Nevertheless, deference is not abdication; it cannot shield counsel's performance from meaningful scrutiny or automatically validate challenged acts and omissions." (*People v. Dennis* (1998) 17 Cal.4th 468, 540–541.)

The first step in the analysis is to determine whether trial counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. In this case, that requires us to determine if the electronic search condition fell within the parameters of *Lent*.

The juvenile court "may impose and require any and all reasonable conditions that it may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced." (§ 730, subd. (b).) The juvenile court has broader discretion over juveniles than superior courts do over adults because juveniles are " 'more in need of guidance and supervision than adults, and because a minor's constitutional rights are more circumscribed.' " (*In re Victor L.* (2010) 182 Cal.App.4th 902, 910.) "Thus, ' " 'a condition of probation that would be

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demonstrated that "the pertinent law later changed so unforeseeably that it is unreasonable to expect trial counsel to have anticipated the change." (*People v. Turner* (1990) 50 Cal.3d 668, 703.) Nor does this case involve misconduct for which an objection and admonition could not cure the resulting prejudice. (*People v. Perkins* (2003) 109 Cal.App.4th 1562, 1567.)

unconstitutional or otherwise improper for an adult probationer may be permissible for a minor under the supervision of the juvenile court.' " ' " (*Ibid*.) "In fashioning the conditions of probation, the juvenile court should consider the minor's entire social history in addition to the circumstances of the crime." (*In re Walter P*. (2009) 170 Cal.App.4th 95, 100.)

A trial court's discretion to determine probation conditions, "although broad, is nonetheless subject to the limitation that [such] conditions must be 'reasonable.' " (*People v. Beal* (1997) 60 Cal.App.4th 84, 86.) Under *Lent*, a condition is valid unless it " '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality . . . .' " (*Lent*, *supra*, 15 Cal.3d at p. 486.) "This test is conjunctive—all three prongs must be satisfied before a reviewing court will invalidate a probation term. [Citations.] As such, even if a condition of probation has no relationship to the crime of which a defendant was convicted and involves conduct that is not itself criminal, the condition is valid as long as the condition is reasonably related to preventing future criminality." (*People v. Olguin* (2008) 45 Cal.4th 375, 379–380 (*Olguin*).) Probation conditions are reviewed for an abuse of discretion. (*Id.* at p. 379.)

Neither of the first two *Lent* prongs support the electronic search condition. The condition has no relationship to K.B.'s offenses because there is no evidence she used electronic devices or social media in connection with her offenses. Likewise, "the typical use of electronic devices and of social media is not itself criminal." (*In re Erica R.* (2015) 240 Cal.App.4th 907, 913 (*Erica R.*).)

Instead, we focus on the third prong under *Lent*—future criminality. (*Lent*, *supra*, 15 Cal.3d at p. 486.) The People contend the condition is reasonable because the electronic search condition will enable probation officers to "ensure that she is complying with her probation conditions, particularly the condition that she remain in placement." In contrast, K.B. maintains the condition is not reasonably related to future criminality because there is no reasonable nexus between K.B.'s offenses, the use of the Internet or social media, and any future criminality.

We conclude the third prong supports the electronic search condition entered in this case. In *Olguin*, our state Supreme Court held a probation condition "that enables a probation officer to supervise his or her charges effectively is . . . 'reasonably related to future criminality,' " even if it "has no relationship to the crime of which a defendant was convicted." (*Olguin*, *supra*, 45 Cal.4th at pp. 380–381.) We adopted this reasoning in *In re P.O.* (2016) 246 Cal.App.4th 288 (*P.O.*), which involved a challenge to a substantially similar electronic search condition. In that case, we concluded the electronic search condition "reasonably relates to enabling the effective supervision of [the minor's] compliance with other probation conditions. Specifically, the condition enables peace officers to review [the minor's] electronic activity for indications that [the minor] has drugs or is otherwise engaged in activity in violation of his [or her] probation." (*Id.* at p. 295.)

As K.B. notes, a split in authority exists among the divisions of our appellate district regarding the reasonableness of similar electronic search conditions. (*See*, *e.g.*, *Erica R.*, *supra*, 240 Cal.App.4th 907 [Division Two striking condition as unreasonable]; *In re J.B.* (2015) 242 Cal.App.4th 749 [Division Three striking condition as unreasonable]; *In re Malik J.* (2015) 240 Cal.App.4th 896 [Division Three holding condition reasonable but overbroad].) However, we believe recent decisions from this district, including specifically from this division, have correctly concluded a probation condition need not relate to the crime for which a defendant was convicted so long as the condition enables probation officers to effectively supervise their charges. (See, e.g., *P.O.*, *supra*, 246 Cal.App.4th at p. 296.)

Here, the electronic search condition is reasonably related to the effective supervision of K.B.'s compliance with her probation. Her current probation conditions prohibit her from leaving placement without prior permission, and require her to obey all laws and follow all reasonable and proper instructions from the juvenile hall staff and her probation officer. K.B. has an extensive history of disregarding these conditions, absconding from placement, threatening violence against others, and harming herself. The record shows a strong need to closely supervise K.B. because of this history. The

electronic search condition will allow the probation department to monitor K.B.'s compliance with her probation by, for example, allowing text messages to be reviewed to assess whether K.B. is threatening violence or planning to abscond from her placement.

Because the electronic search condition is reasonably related to K.B.'s future criminality, trial counsel's representation of K.B. did not fall below an objective standard of reasonableness when he failed to object to the reasonableness of the condition. Accordingly, we reject K.B.'s claim that trial counsel was ineffective.

B. *The Electronic Search Condition Is Overbroad*

While we conclude the electronic search condition's infringement on privacy rights is permissible in these circumstances, that does not end the issue. Any "probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad." (*In re Sheena K.*, *supra*, 40 Cal.4th at p. 890.) " 'The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the [probationer]'s constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement.' " (*P.O.*, *supra*, 246 Cal.App.4th at p. 297, quoting *In re E.O.* (2010) 188 Cal.App.4th 1149, 1153.) "Whether a probation condition is unconstitutionally overbroad presents a question of law reviewed de novo." (*P.O.*, at p. 297.)

In asserting the electronic search condition is overbroad, K.B. relies on *Riley v. California* (2014) ___ U.S. ___ [134 S.Ct. 2473]. We agree with the People that *Riley* is distinguishable because the arrestee in that case had not yet been convicted of any crime, whereas K.B. admitted to committing a crime and is a ward of juvenile court. However, the discussion in *Riley* regarding the expansive scope of information available through electronic devices is applicable. In *Riley*, the court distinguished a search of a modern cell phone's contents from a typical search of other property because of the "broad array of private information" contained on a cell phone. (*Id.* at p. 2491.) "Mobile application software on a cell phone, or 'apps,' offer a range of tools for managing detailed

information about all aspects of a person's life," including financial, medical, romantic, and political. (*Id.* at p. 2490.)

We agree with K.B. the condition imposed by the juvenile court is overbroad. The information that may be contained in K.B.'s electronic devices and accounts is similarly broad. As phrased, the condition does not limit the type of data on or accessible through K.B.'s electronic devices that may be searched in light of the permissible purposes. The condition therefore permits review of private information that is highly unlikely to shed any light on whether K.B. is complying with her probation. As a result, we conclude it is not narrowly tailored to accomplish K.B.'s rehabilitation.

Nor does *In re J.E.* (2016) 1 Cal.App.5th 795, which is cited by the People, alter this analysis. *J.E.* involved a minor who was extensively involved in gangs, had significant drug problems, and had an unstable family life. (*Id.* at p. 798.) As a result, the court concluded "[a] broad electronic search condition is appropriate for the level of supervision Minor requires." (*Id.* at p. 807.) While K.B. faces challenges stemming from her past abuse and current mental health issues, we note she appears to have a supportive family and is not involved in any drug or gang activity.[4]

The condition must limit searches to sources of electronic information that are reasonably likely to reveal whether K.B. is complying with the terms of her probation. To satisfy this scope, the electronic search condition should be limited to programs used for interpersonal communication. It need not include other accounts and information that may be contained in or accessed through a cell phone or other electronic device. We therefore modify the condition to limit the probation officer's search authority to media of communication reasonably likely to reveal whether K.B. is in compliance with her probation, such as text messages, voicemail messages, photographs, e-mail accounts, and

[4] The People also argue we should follow *In re Q.R.* (2017) 7 Cal.App.5th 1231, in which the Sixth Appellate District refused to limit an electronic search condition to only the minor's cell phone. (*Id.* at pp. 1236–1237.) We agree the electronic search condition should not be limited to a cell phone, but this does not resolve the broader issue regarding the scope of information accessible through electronic devices.

social media accounts. While K.B. must provide the probation officer with passwords necessary to gain access to these accounts, to the extent any other types of digital accounts maintained by K.B. are password protected, she is not required to disclose those passwords.

III. DISPOSITION

The search condition set forth at the October 19, 2016 hearing is affirmed as modified. The condition is modified to read: "The minor shall submit all electronic devices under her control to a search by the probation officer or law enforcement of any medium of communication reasonably likely to reveal whether she is complying with the terms of her probation, with or without a search warrant, at any time of the day or night, and provide the probation or law enforcement officer with any passwords, password patterns, fingerprints, or other information necessary to access the information specified. Such media of communication includes text messages, voicemail messages, photographs, e-mail accounts, and social media accounts."

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Margulies, J.

We concur:

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Humes, P.J.

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Dondero, J.

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